EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-3143
SUMMARY CALENDAR*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROSS DOUGLAS RING,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida.

(March 12, 1974)

Before WISDOM, GOLDBERG, and GEE, Circuit Judges.

OVERSIZE PAGE
SEE NEXT FRAME

versus

ROSS DOUGLAS RING,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida.

(March 12, 1974)

Before WISDOM, GOLDBERG, and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.* [1]

---

*Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

---

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73 - 6969

ROSS DOUGLAS RING, :

Petitioner, :

vs. :

THE UNITED STATES OF AMERICA, :

Respondent. :

MOTION FOR PETITIONER TO FILE
IN FORMA PAUPERIS

Comes now the Petitioner, ROSS DOUGLAS RING, by and through his undersigned attorney, and files this, his Motion to file in forma pauperis to the Supreme Court of the United States, for the following relief:

1. That an Order issue granting leave to file the Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in forma pauperis and permitting the Petition herein to be heard on the original papers in the Courts Below without printing the same and upon type written copies of the points of appeal.

I HEREBY CERTIFY that a copy of the foregoing Motion has been furnished to the United States District Attorney's Office, at

the Post Office Building in Miami, Florida, by mail, this 24th day of June, 1974.

THOMAS F. GRANAHAN, P. A.
403 Madison Street, Suite 500
Tampa, Florida 33602
Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
Oct. Term, 1973

No. 73 - 6969

ROSS DOUGLAS RING, :

Petitioner, :

vs. :

THE UNITED STATES OF AMERICA, :

Respondent. :

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THOMAS F. GRANAHAN, P. A.
403 Madison Street
Tampa, Florida 33602
Attorney for Petitioner

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii, iii
JURISDICTION	2
QUESTIONS PRESENTED	2
Question I: DID THE DENIAL OF RECROSS EXAMINATION CONSTITUTE REVERSIBLE ERROR WHERE THE PROSECUTOR WAS PERMITTED TO EXAMINE A WITNESS AS TO NEW MATTERS ON REDIRECT?	
QuestionII: DOES A STATEMENT BY THE PROSECUTOR THAT THE GOVERNMENT "HAD NOT DROPPED ANY CHARGES" CONSTITUTE REVERSIBLE ERROR WHERE THE UNCONTRADICTED TESTIMONY OF A GOVERNMENT WITNESS WAS THAT SHE ENTERED A GUILTY PLEA TO ONE COUNT OF A THREE COUNT INDICTMENT AND THAT SHE HAD BEEN ADVISED THAT IF SHE TESTIFIED THE COURT MIGHT BE MORE LENIENT?	
POINTS OF ERROR	2
POINTS OF ERROR - FIRST POINT OF ERROR	2-9
POINTS OF ERROR - SECOND POINT OF ERROR	9-16
CONCLUSION	17
CERTIFICATE OF SERVICE	18

TABLE OF AUTHORITIES

	Page
KITCHEN v UNITED STATES 221 F. 2d 832, 835 (D.C. Cir. 1955)	5
357 U.S. 928	5
UNITED STATES v STOEHR 96 F. 2d 276 (3d Cir. 1952)	5
344 U.S. 826	5
FAULK v STATE 47 Ga. App. 804, 171 S.E. 570, 571	5
HALE v UNITED STATES 435 F. 2d 737 (5th Cir. 1970)	6
402 U.S. 976	6
F. R. Cr. P. Rule 26	6
18 U.S.C.A.	6
HALE v UNITED STATES Supra at 751	7
UNITED STATES v KAHN 472 F. 2d 272 (2d Cir. 1973)	7
UNITED STATES v KENNEY 462 F. 2d 582 (10th Cir. 1972)	7
UNITED STATES v MILLER 460 F. 2d 582 (10th Cir. 1972)	7
STOEHR, SUPRA at 280-81	7
HALE, SUPRA, at 751	7
J. E. HANGER, INC. v UNITED STATES 81 U.S. App. D.C. 408, 160 F. 2d 8 (D.C. Cir. 1947)	8

GANDY v UNITED STATES 12
386 F. 2d 516 (5th Cir. 1967)

390 U.S. 1004 13

NAPUL v ILLINOIS 13
360 U.S. 264 (1959)

UNITED STATES v SOBER 14
281 F. 2d 244 (3d Cir. 1960)

UNITED STATES v BARBONE 14
283 F. 2d 628, 632 (3d Cir. 1960)

UNITED STATES v HOLT 14
108 F. 2d 365 (7th Cir. 1940)

309 U.S. 672, 698 14

UNITED STATES v SPANGELET
258 F. 2d 338 (2d Cir. 1958) 14

UNITED STATES v MARCHESE
341 F. 2d 782 (9th Cir. 1965) 15

UNITED STATES v. MASINO 16
275 F 2d 129 (2d Cir. 1960)

MEEKS v UNITED STATES 16
163 F 2d 598 (9th Cir. 1947)

UNITED STATES v HOGAN
232 F 2d 905 (3d Cir. 1956) 16

OTHER CITATIONS

6 Wigmore, EVIDENCE § 1897 5

SHERMAN ANTI-TRUST ACT 8

WIGMORE, Vol. III § 967 (3d ed.) 15

ROSS DOUGLAS RING petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit in this case, entered on the 12th day of March, 1974.

JURISDICTION

The Judgment of the United States Court of Appeals, for the Fifth Circuit was entered on March 12, 1974. (See Appendix A) A timely Petition for Rehearing, or in the Alternative, to Transfer to Court En Banc in the United States Court of Appeals for the Fifth Circuit was denied on May 31, 1974. (See Appendix B) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

DID THE DENIAL OF RECROSS EXAMINATION CONSTITUTE REVERSIBLE ERROR WHERE THE PROSECUTOR WAS PERMITTED TO EXAMINE A WITNESS AS TO NEW MATTERS ON REDIRECT?

II

DOES A STATEMENT BY THE PROSECUTOR THAT THE GOVERNMENT "HAD NOT DROPPED ANY CHARGES" CONSTITUTE REVERSIBLE ERROR WHERE THE UNCONTRADICTED TESTIMONY OF A GOVERNMENT WITNESS WAS THAT SHE ENTERED A GUILTY PLEA TO ONE COUNT OF A THREE COUNT INDICTMENT AND THAT SHE HAD BEEN ADVISED THAT IF SHE TESTIFIED THE COURT MIGHT BE MORE LENIENT?

POINTS OF ERROR

The Court of Appeals for the Fifth Circuit erred in affirming the Trial Court by a Per Curium Decision.

FIRST POINT OF ERROR

I.

DID THE DENIAL OF RECROSS EXAMINATION CONSTITUTE REVERSIBLE ERROR WHERE THE PROSECUTOR WAS PERMITTED TO EXAMINE A WITNESS AS TO NEW MATTERS ON REDIRECT?

The prosecutor, Assistant U. S. Attorney, Carol Anderson, on Redirect Examination (Tr.60) raised for the first time statements made by the government's witness, Michele Rubio, against the Defendant, Ross Douglas Ring.

The entire Redirect Examination follows:

"BY MRS. ANDERSON:

Q Agent Morphis, do you recall Miss Rubio's making any statement concerning Mr. Ring and participation in the cocaine?

A Yes ma'am. Let me think. She may have said more than one - I am trying to remember now. I did ask her after I found the documents I have identified here, the health certificates, as I have testified, I asked her if she knew Mr. Ring, if they were friends and I asked her if he was aware that she had had the cocaine concealed on her person. And she said that - she replied:

"Of course he did. Of course he knew."

And then later on, when Special Agent Keller and myself transported Miss Rubio to the Marshal's office here, after the arrest, we were driving along in the car and we asked her where

we might be able - we tried to locate Mr. Ring at the airport after Miss Rubio was arrested. We figured if he was traveling with her, he might still be around, being a friend of hers, but we couldn't locate him anywhere. And we asked her where we might be able to contact him. And her reply was:

"Well, what are you so interested in him for? He is just a little fish in this operation."

MRS. ANDERSON: Thank you. I have nothing further." (Tr. 60,61)

It is obvious from reading the above Redirect Examination of the Prosecutor, U.S. Attorney, Carol Anderson, that on Redirect Examination she raised for the first time statements of a vital and crucial nature made by the government's witness, Michele Rubio, against the Defendant, Ross Douglas Ring.

It cannot be emphasized more poignantly than Agent Morphis' statement when he asked Michelle Rubio if Mr. Ring was aware that she had the cocaine concealed on her person, and she replied, "Of course he did. Of course he knew." (Tr. 61,62); that this statement was new matter on Redirect Examination of a vital nature going to guilty knowledge and the essence of the charge of conspiracy ledged against the Defendant, Ross Douglas Ring, in the language of Count I of the Indictment.

It may further be noted that the Prosecutor, Carol Anderson, through her Redirect Examination of Agent Morphis further brings out a new matter of a damning nature as follows:

"And we asked her where we might be able to contact him. And her reply was:

> 'Well, what are you so interested in him for? He is just a little fish in this operation.'" (Tr. 61).

When the defendant's attorney attempted to recross Agent Morphis on this new matter the learned Trial Judge, the Honorable Norman C. Roettger, Jr., stated:

"I am sorry, no recross. Sir, no recross. I don't permit recross." (Tr. 61, 62).

The district courts have some discretion in limiting cross-examination, but they have a considerable amount of discretion in limiting recross-examination. Kitchen v. United States, 221 F. 2d 832, 835 (D.C. Cir. 1955), Cert. Denied, 357 U.S. 928; United States v. Stoehr, 96 F. 2d 276 (3d Cir. 1952), Cert. Denied, 344 U.S. 826. Both the Third and Fifth Circuit Courts of Appeals have further recognized two classes of testimony which might be sought on recross-examination. In the Stoehr Case the Third Circuit stated that:

> Where new evidence is opened upon direct examination, opposing party must be given the right of cross-examination on the new matter, but the privilege of recross-examination as to matters not covered on redirect-examination lies within the trial court's discretion. See 6 Wigmore, Evidence §§ 1897; Faulk vs. State, 47 Ga. App. 804, 171 S.E. 570, 571.

Id. at 280. Hale v. United States, 435 F. 2d 737 (5th Cir. 1970) (citing Stoehr), Cert Denied, 402 U.S. 976, F.R. Cr. P. Rule 26, 18 U.S.C.A. The Stoehr Case involved the prosecution of a Defendant for alleged tax evasion and two objections as to restrictions placed upon recross-examination were raised. Stoehr's first objection was raised when the court refused to allow his defense attorney to reopen a subject on recross which was thoroughly explored on cross-examination. Since the matter in question was not raised by the prosecution on redirect, the court of appeals found that the trial court could refuse to allow those questions in the proper exercise of its discretion. United States v. Stoehr at 280.

A second objection arose after the prosecutor, on redirect, questioned Stoehr's business manager as to tax returns submitted from 1939-1943. The years 1943-1945 were covered on direct and were also mentioned in the indictment. An attempt was made by the defense attorney to question the witness as to his own alleged manipulation of figures prior to 1939, but the court refused to allow the question and the defense objected. Again, since the questions tendered by the defense on recross did not concern matters raised on redirect, the court of appeals found that the trial court "was well within its discretion" in sustaining the objection made by the prosecutor. Id. at 280-81.

The right to recross-examination only exists as to matters brought out on redirect. Id. at 280-81; Hale v. United States, Supra at 751.

Several other cases have held that the refusal to allow recross-examination was not error, but these cases involved either questions which obviously fell within the privileged category or attempted abuses on the part of defense attorneys. United States v. Kahn, 472 F. 2d 272 (2d Cir. 1973) (where the attorney was attempting to break a witness through cross and recross although his testimony was corroborated by other evidence;) United States v. Kenney, 462 F. 2d 1205 (3d Cir. 1972), Cert. Denied; (where the matter was available on cross, no recross was allowed); United States v. Miller, 460 F. 2d 582 (10th Cir. 1972) (where attorney wanted to repeat on recross a question already asked on cross).

However, the present case clearly presents a situation in which the right to recross-examination does exist. That is, the questions directed to Agent Morphis on redirect as to statements made by the government's witness (Rubio) were being raised for the first time on redirect, and under the Stoehr and Hale Decisions the defense had a right to recross-examination as to those new matters. Stoehr, Supra at 280-81; Hale, Supra at 751. Therefore, although the court may exercise discretion as to matters in the privileged category, the weight of authority is that in situations

where new matters are introduced on redirect the right to recross assumes the same status as the right to cross-examination and the discretion to be exercised by the court becomes much narrower.

In J. E.Hanger, Inc. v. United States, 81 U.S. App. D.C. 408, 160 F. 2d 8 (D. C. Cir. 1947), the court stated that "cross-examination is a matter of right and not a mere privilege." Id. at 10. Conceding that "the control of cross-examination is within the discretion of the trial judge," the court went on to state that:

> (It) is only after a party has had an opportunity substantially to exercise the right of cross-examination that discretion becomes operative.

Id. at 10. Similarly the cases seem to support the proposition that the court's discretion can only be invoked after the defense had an "opportunity substantially to exercise" the right to recross-examination.

The Hanger Case was concerned with an alleged conspiracy to fix prices in violation of the Sherman Anti-Trust Act. An employee of one of the defendants testified for the government, and the purpose in calling the witness was to show that certain government exhibits came from the employers file. At the conclusion of the direct testimony, the defense counsel was denied the right to cross-examine. Finding that the refusal to allow the defense to cross-examine the witness constituted an abuse of

discretion which prejudiced the case, the court reversed the lower court's opinion. It is respectfully urged that the denial of the opportunity for recross-examination in the present case where new matters had been introduced on redirect-examination was reversible error.

SECOND POINT OF ERROR

II.

DOES A STATEMENT BY THE PROSECUTOR THAT THE GOVERNMENT "HAD NOT DROPPED ANY CHARGES" CONSTITUTE REVERSIBLE ERROR WHERE THE UNCONTRADICTED TESTIMONY OF A GOVERNMENT WITNESS WAS THAT SHE ENTERED A GUILTY PLEA TO ONE COUNT OF A THREE COUNT INDICTMENT AND THAT SHE HAD BEEN ADVISED THAT IF SHE TESTIFIED THE COURT MIGHT BE MORE LENIENT?

The co-defendant and later turned government witness, Michele Denise Rubio, testified as follows on cross-examination: (Tr. 36, 37, 38)

Q Miss Rubio, you are aware of what you are charged with, are you not?

A Yes, I am.

Q And you are aware, I presume that you are charged with three count indictment, are you not?

A Yes, I am.

Q Do you know what those counts charged you with?

A Yes, I do.

Q What do you believe they charged you with?

A They charged me with possession, importation, conspiracy and intent to distribute.

Q And you only pled guilty to one of those counts, isn't that correct?

A Yes, I did.

Q Which count did you plead guilty to?

A I originally pled guilty to Count II, but now I am going to change my counts and plead guilty to Count I.

Q Which would be conspiracy to import, is that correct?

A Yes sir.

Q You are aware, are you not, that Mr. Ring was only charged with one count of the Indictment?

A Yes, I am.

Q Are you telling us here under oath today, Miss Rubio, no one promises you anything?

A Yes, I am . No one has promised me anything.

Q Anybody advise you that if you testify that it would go easier for you?

A My lawyer said it could help or it couldn't; could go either way.

Q What did he say to you?

A. That, you know, that maybe they would be a little more lenient if I testified but that he couldn't say for sure if they would or not; that he thought it was the right thing for me to do.

So I agreed to come and testify.

Q When he said it might go a little bit easier for you, did you believe him?

A I don't know. I don't know if it will go any easier for me or if it won't.

Q Would it be safe to say that you disbelieved your attorney?

A No, I don't disbelieve him.

Q Then you believed him.

A. Yes, I believe him.

Q That it might go easier for you?

A That it might or might not go easier for me."

The counsel for the defense in his closing argument commented on the co-defendant and government witness, Michele Denise Rubio's answers on cross examination (Tr. 36, 37, 38) in the following language: (Tr. 128)

"I asked Miss Rubio did she expect any leniency. She said, 'No, I don't expect any leniency.' However you know that Miss Rubio was charged with three counts in this Indictment: Conspiracy, importation and possession; but yet miraculously two of these counts have been dropped. Does that create a reasonable doubt as to what she hopes to gain by this? This has never been explained to you.

Also, I'd like to point out something very peculiar. She said no promises were made to her at all; but yet she said under

So I agreed to come and testify.

Q When he said it might go a little bit easier for you, did you believe him?

A I don't know. I don't know if it will go any easier for me or if it won't.

Q Would it be safe to say that you disbelieved your attorney?

A No, I don't disbelieve him.

Q Then you believed him.

A. Yes, I believe him.

Q That it might go easier for you?

A That it might or might not go easier for me."

The counsel for the defense in his closing argument commented on the co-defendant and government witness, Michele Denise Rubio's answers on cross examination (Tr. 36, 37, 38) in the following language: (Tr. 128)

"I asked Miss Rubio did she expect any leniency. She said, 'No, I don't expect any leniency.' However you know that Miss Rubio was charged with three counts in this Indictment: Conspiracy, importation and possession; but yet miraculously two of these counts have been dropped. Does that create a reasonable doubt as to what she hopes to gain by this? This has never been explained to you.

Also, I'd like to point out something very peculiar. She said no promises were made to her at all; but yet she said under

cross-examination that her attorney told her it would go better for her if she testified. What does that mean? You draw your own conclusions on that one."

The prosecutor, Carol Anderson, in her closing argument stated: (Tr. 135)

"Ladies and gentlemen , two counts of the Indictment against Miss Rubio have not been dropped. This is a totally inaccurate and false statement."

At this point in the prosecutor's closing argument, defense counsel raised an objection but was not allowed to articulate the grounds upon which the objection was based as the judge overruled him before the objection was entered into the record. (Tr. 135, 136)

After the prosecutor concluded her closing argument, the defense moved for a mistrial due to the prejudicial statement made by the prosecutor in her closing argument, or in the alternative, for additional time to answer the prosecution. Both motions were denied. (Tr. 138)

Attorneys in their jury arguments are never allowed to make representations of their own because they are advocates and not witnesses. Gandy v. United States, 386 F. 2d 517 (5th Cir. 1967),

Cert. Denied, 390 U.S. 1004( ). In the Gandy Case an accomplice who was not indicted, although named as a co-conspirator, testified for the government and stated that he had not been promised any "deals". During his closing argument the prosecutor stated that:

> "I cannot tell you sincerely enough that that is absolutely false and that there is no basis in the fact at all."

Id. at 516. The court held that the prosecutor's statement was not reversible where there was no testimony contradicting the witness' testimony and explained that the prosecutor's statement merely alluded to the statement of the witness. Id. at 518.

However, in the present case the only evidence as to a "deal" was the statement of the government's witness to the effect that upon entry of a guilty plea on one count of a three count indictment, the other two charges were dropped. No evidence to the contrary was introduced. The Supreme Court held in Napul v. Illinois, 360 U.S. 264 (1959), that where a witness falsely testified that he had not received any promises for his testimony and the assistant state's attorney failed to correct him, the defendant in the case was denied due process of law under the Fourteenth Amendment.

In the present case the comment of the prosecutor, Carol Anderson, so severely prejudiced the Defendant's case to the jury that failure of the trial judge to grant a mistrial denied the defendant his fundamental right to due process under the due

process clause of the Fifth Amendment of the Constitution of the United States of America.

There is overwhelming authority to support the proposition that the statement made by the prosecutor was improper. It has been stated that:

> Every defendant is of course jealously protected against inflammable statements, (and) against prejudicial statements not based upon the evidence or fair and reasonable deductions from it... United States v. Sober, 281 F. 2d 244 (3d Cir. 1960).

United States v. Barbone, 283 F. 2d 628, 632 (3d Cir. 1960). The District Attorney in his argument to the jury is required to limit himself to a "discussion of the facts disclosed by the evidence or legitimate inferences which may be deduced." United States v. Holt, 108 F. 2d 365 (7th Cir. 1940), Cert. Denied, 309 U.S. 672, Rehearing Denied, 309 U.S. 698.

In United States v. Spangelet, 258 F. 2d 338 (2d Cir. 1958), the Second Circuit Court of Appeals held that:

> Where defendant's counsel attempted to impeach the testimony of a major witness for the prosecution by showing that his bail had been reduced from $50,000 to $1,000 after a conference with the prosecutor, and where defendant's counsel in his summation referred to the reduction in bail and stated that the witness had every motive for lying, the statement of the assistant United States Attorney in reply in her summation that she had never made a deal with anyone was reversible error, which was not

> cured by an instruction that the only time a person testifies is when he takes the stand and testifies from the witness stand, and that the Assistant United States Attorney was not testifying.

Id. at 338 (emphasis added). The Spangelet case is directly on point with the case at hand with the exception that the"deal" in Spangelet involved a substantial reduction in bail while the "deal" in the present case involved the dropping of two counts in the Indictment. Crucial to the analysis here is the recognition that in both instances key government witnesses received some benefit from, or consideration for, testifying for the government.

In United States v. Marchese, 341 F. 2d 782 (9th Cir. 1965), the Ninth Circuit Court of Appeals noted that:

The evidentiary rule involved is expressed in Wigmore, Vol. III § 967 (3d ed.)

> It bears against a witness' credibility that he is an accomplice in the crime charged and testifies for the prosecution, and the pendency of any indictment against the witness indicates indirectly a similar possibility of his currying favor by testifying for the State. So, too, the existence of a promise or just expectation of pardon for his share as accomplice in the crime charges.

Id. at 800 (emphasis added). Since questions concerning the credibility of witnesses are reserved for the jury in our system, statements such as the one made by the prosecutor in the present case infringe upon the province of the jury. Further expounding upon the theory upon which the previously mentioned evidentiary rule is based, the Marchese court stated that:

> everyone is interested in bettering himself and in saving himself from punishment, and hence that the testimony of such an accomplice testifying with the hope or existing possibility or promise of future benefit or leniency should be carefully tested and weighed and considered by the trier of fact. Cf. United States v. Masino, 275 F. 2d 129 (2d Cir. 1960); Meeks v. United States, 163 F. 2d 598 (9th Cir. 1947); United States v. Hogan, 232 F. 2d 905 (3d Cir. 1956).

Id. at 800. The court further stated that:

> (The) jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

ID. at 800. Therefore, prosecuting attorneys must be restricted from invading the province of the jury.

The present case is representative of the situtation described in the preceding paragraph. As its key witness the government called a co-conspirator, Michele Denise Rubio, and the jury could very well have based their decision as to the defendant's innocence or guilty upon whether they believed the witness.

It is respectfully submitted that the prosecutor, Carol Anderson, in the instant case clearly and prejudicially invaded the province of the jury and committed reversible error.

CONCLUSION

Based on the above and foregoing reasons, arguments and authorities the judgment and sentence of the lower court should be reversed.

The defendant was deprived of due process of law and a fair trial as guaranteed by the Constitution of the United States of America and by the prejudicial error committed by the prosecutor and the trial judge.

Secondly, that there is conflict in the ruling of the United States Courts of Appeals regarding the aforementioned questions and the law is not clear on thispoint and in support of the same would cite the cases previously mentioned.

Thirdly, it is imperative that the United States Supreme Court clarify the law which is currently in conflict between the various United States Courts of Appeals.

Respectfully submitted,

THOMAS F. GRANAHAN, P. A.
403 Madison Street, Suite 500
Tampa, Florida 33602
Attorney for Petitioner

ORIGINAL COPY

No. 73-6969

SEP 2 01974
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

ROSS DOUGLAS RING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-6969

ROSS DOUGLAS RING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court's denial of recross-examination and the prosecutor's summation were improper.

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of having conspired to import a Schedule II controlled substance (cocaine), in violation of 21 U.S.C. 841(a)(1) and 952(a). He was sentenced to a term of four years' imprisonment. The court of appeals summarily affirmed (Pet. App. A; 491 F. 2d 1271) and denied rehearing (Pet. App. B).

The evidence showed that on December 2, 1972, petitioner and Michele Rubio[1/] left Miami, Florida, for Barranquilla, Colombia (Tr. 17, 18).[2/] Rubio, who testified as a government witness,

ZE PAGE
XT FRAME

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court's denial of recross-examination and the prosecutor's summation were improper.

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of having conspired to import a Schedule II controlled substance (cocaine), in violation of 21 U.S.C. 841(a)(1) and 952(a). He was sentenced to a term of four years' imprisonment. The court of appeals summarily affirmed (Pet. App. A; 491 F. 2d 1271) and denied rehearing (Pet. App. B).

The evidence showed that on December 2, 1972, petitioner and Michele Rubio[1/] left Miami, Florida, for Barranquilla, Colombia (Tr. 17, 18).[2/] Rubio, who testified as a government witness,

---

1/ Rubio had been jointly indicted with petitioner for having conspired to import cocaine (Count I); additionally she was charged with importation of a narcotic substance (Count II) and possession with intent to distribute (Count III). Following petitioner's trial, Rubio pleaded guilty to Count I, and Counts II and III were dismissed.

2/ "Tr." refers to the one-volume trial transcript.

stated that petitioner had planned and financed the trip for the purpose of purchasing cocaine (Tr. 17). Petitioner had promised to pay Rubio "between $500 and $1,000" for her participation in the scheme. Rubio further testified that, after the cocaine was delivered to their room, they concealed it on her person and boarded a plane for the return flight to Miami (Tr. 19-20).

While petitioner and Rubio were having their baggage inspected, a customs officer became suspicious of Rubio's bulky appearance and requested that she submit to a secondary examination (Tr. 44). The subsequent examination disclosed that she had concealed under her clothes eight plastic bags containing four and one-half pounds of cocaine (Tr. 49-50, 53).

1. Petitioner's claim that the trial court erred in denying him the opportunity to conduct recross-examination of customs agent Morphis is without merit.

Agent Morphis testified on direct-examination that he had taken custody of and weighed the contraband following the search of Rubio (Tr. 53-54). On cross-examination, the agent stated that he had assisted the processing of Rubio (Tr. 55), that she had made statements at that time (Tr. 56) and that they had been recorded by agent Keller. Petitioner's counsel questioned Morphis extensively about certain of these statements, particularly emphasizing the fact that Rubio told the agents that the cocaine had been delivered to the hotel by a man who spoke only Spanish (Tr. 56-60). During the brief redirect-examination, Morphis

PAGE
FRAME
NDER OF PAGE

inspected, a customs officer became suspicious of Rubio's bulky appearance and requested that she submit to a secondary examination (Tr. 44). The subsequent examination disclosed that she had concealed under her clothes eight plastic bags containing four and one-half pounds of cocaine (Tr. 49-50, 53).

1. Petitioner's claim that the trial court erred in denying him the opportunity to conduct recross-examination of customs agent Morphis is without merit.

Agent Morphis testified on direct-examination that he had taken custody of and weighed the contraband following the search of Rubio (Tr. 53-54). On cross-examination, the agent stated that he had assisted the processing of Rubio (Tr. 55), that she had made statements at that time (Tr. 56) and that they had been recorded by agent Keller. Petitioner's counsel questioned Morphis extensively about certain of these statements, particularly emphasizing the fact that Rubio told the agents that the cocaine had been delivered to the hotel by a man who spoke only Spanish (Tr. 56-60). During the brief redirect-examination, Morphis testified without objection that Rubio had told him that petitioner had known of the narcotics concealed on her person (Tr. 61). When petitioner's counsel indicated that he had a few more questions, the trial judge stated that the "court does not permit recross" (Tr. 61-62). No objection was taken to this ruling nor did petitioner's counsel state the nature of the questions he intended to ask.

Petitioner argues that agent Morphis' statement on redirect "was new matter * * * of a vital nature going to guilty knowledge and the essence of the charge of conspiracy* * *" (Pet. 4). However, petitioner himself prompted the redirect testimony by probing the contents of Rubio's statements on cross-examination of agent Morphis. Indeed, petitioner must have known that he would evoke such redirect testimony since his cross-examination of agent Morphis was based upon a "facsimile" of Rubio's recorded statements (Tr. 57) respecting her and petitioner's involvement in the narcotics transaction (Tr. 57). In these circumstances, the redirect testimony was not a "new matter" and the trial court's denial of recross-examination did not prejudice petitioner or constitute reversible error. Cf. United States v. Kenny, 462 F. 2d 1205, 1226 (C.A. 3), certiorari denied, 409 U.S. 914. In any event, petitioner later had ample opportunity to question agent Keller, who recorded Rubio's statement about petitioner's knowledge--and petitioner chose not to pursue the matter (Tr. 69-71).

2. Petitioner also challenges the propriety of a portion of the prosecution's summation, claiming that it impermissibly buttressed the credibility of Rubio. This contention is without substance.

Rubio testified on cross-examination that she had pled guilty to Count II of the three-count indictment against her, that she intended to change her plea and to plead guilty to Count I

would evoke such redirect testimony since his cross-examination of agent Morphis was based upon a "facsimile" of Rubio's recorded statements (Tr. 57) respecting her and petitioner's involvement in the narcotics transaction (Tr. 57). In these circumstances, the redirect testimony was not a "new matter" and the trial court's denial of recross-examination did not prejudice petitioner or constitute reversible error. Cf. United States v. Kenny, 462 F. 2d 1205, 1226 (C.A. 3), certiorari denied, 409 U.S. 914. In any event, petitioner later had ample opportunity to question agent Keller, who recorded Rubio's statement about petitioner's knowledge--and petitioner chose not to pursue the matter (Tr. 69-71).

2. Petitioner also challenges the propriety of a portion of the prosecution's summation, claiming that it impermissibly buttressed the credibility of Rubio. This contention is without substance.

Rubio testified on cross-examination that she had pled guilty to Count II of the three-count indictment against her, that she intended to change her plea and to plead guilty to Count I instead, and that she had been offered no promises of leniency in exchange for her testimony (Tr. 36-38). She was not asked about the disposition of the other two counts. In his summation, petitioner's counsel stated (Tr. 128, 130-131):

> I asked Miss Rubio did she expect any leniency. She said, "No, I don't expect any leniency." However you know that Miss Rubio was charged with three counts in this indictment: Conspiracy, importation and possession; but yet miraculously

> two of these counts have been dropped. Does that create a reasonable doubt as to what she hopes to gain by this? This has never been explained to you.
>
> * * * *
>
> Ask Mrs. Anderson [the prosecutor] to explain to you why two counts of this three-count indictment against Miss Rubio were dropped.

During rebuttal argument, the prosecutor responded to the comments of petitioner's counsel (Tr. 135):

> Now finally he said you should ask me why were two counts of the indictment against Miss Rubio dropped. Ladies and gentlemen, two counts of the indictment against Miss Rubio have not been dropped.

There was no evidence that any counts had been dismissed and the court records confirm that no counts had been dismissed at the time of trial.[3/] Accordingly, the statement of the prosecutor in response to defense counsel's invitation of an explanation why (as he stated without factual basis) two counts had been dropped, was a literally accurate summary of the evidence of record.[4/] While it might have been the better course to call the misstatement of petitioner's counsel to the attention of the court and ask for an appropriate corrective statement, neither the prosecutor's response in the course of closing argument, nor the court's denials of petitioner's request for a mistrial or

---

3/ The trial took place on June 18, 1973. The court records show that one month prior to the trial, pursuant to local practice, Rubio signed a petition to plead guilty to Count I of the three-count indictment. On July 11, 1973, almost a month after the trial, her guilty plea to Count I was accepted by the court, and she was sentenced under the Youth Corrections Act, and on July 18, 1973, the remaining counts were dismissed.

> Now finally he said you should ask me why were two counts of the indictment against Miss Rubio dropped. Ladies and gentlemen, two courts of the indictment against Miss Rubio have not been dropped.

There was no evidence that any counts had been dismissed and the court records confirm that no counts had been dismissed at the time of trial.[3/] Accordingly, the statement of the prosecutor in response to defense counsel's invitation of an explanation why (as he stated without factual basis) two counts had been dropped, was a literally accurate summary of the evidence of record.[4/] While it might have been the better course to call the misstatement of petitioner's counsel to the attention of the court and ask for an appropriate corrective statement, neither the prosecutor's response in the course of closing argument, nor the court's denials of petitioner's request for a mistrial or

---

3/ The trial took place on June 18, 1973. The court records show that one month prior to the trial, pursuant to local practice, Rubio signed a petition to plead guilty to Count I of the three-count indictment. On July 11, 1973, almost a month after the trial, her guilty plea to Count I was accepted by the court, and she was sentenced under the Youth Corrections Act, and on July 18, 1973, the remaining counts were dismissed.

4/ According to the records of the United States Attorney's Office (the prosecutor who handled this case is no longer associated with the United States Attorney's Office), it appears that the prosecutor had agreed prior to the trial that if Rubio pled guilty to one count of the indictment the other two would be dismissed by the government. As the existence of such an agreement, its terms, and Rubio's knowledge of it, cannot be determined on the record before this Court, there is presently no occasion for the Court to consider whether the prosecutor failed to make any required disclosures. Cf. Giglio v. United States, 405 U.S. 150. Such an issue should be (footnote continued)

for additional time to respond,[5] constituted reversible error.[6] Cf. Donnelly v. De Christoforo, No. 72-1570, decided May 13, 1974, slip op. pp. 9-10.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

4/ (continued) initially considered by the district court on a factual record developed in connection with an appropriate post-trial motion.

5/ The court had instructed the jury that the "statements and arguments of counsel are not evidence" (Tr. 10) and that they should decide solely on the basis of the evidence (Tr. 9, 12, 139). Petitioner's counsel sought no further instruction on this matter.

6/ Petitioner's reliance (Pet. 14-15) upon United States v. Spangelet, 258 F. 2d 338 (C.A. 2), is misplaced. There the prosecutor stated, in response to a justifiable inference that there may have been a "deal" concerning reduction of bail for

SEPTEMBER 1974.

4/ (continued) initially considered by the district court on a factual record developed in connection with an appropriate post-trial motion.

5/ The court had instructed the jury that the "statements and arguments of counsel are not evidence" (Tr. 10) and that they should decide solely on the basis of the evidence (Tr. 9, 12, 139). Petitioner's counsel sought no further instruction on this matter.

6/ Petitioner's reliance (Pet. 14-15) upon United States v. Spangelet, 258 F. 2d 338 (C.A. 2), is misplaced. There the prosecutor stated, in response to a justifiable inference that there may have been a "deal" concerning reduction of bail for a witness, that he, the prosecutor, had never made a "deal" during his career as a prosecutor. As the court noted, this statement constituted unsworn testimony by the prosecutor, wholly without substantiation in the record, on a matter peculiarly within his own personal knowledge (rather than a matter of public record), and involving his own personal integrity. Id. at 342-343.

RING *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73-6969. Decided November 11, 1974

Where the Assistant United States Attorney prosecuting petitioner denied during the trial that two counts of a three-count indictment against the Government's chief witness involving the same events for which petitioner was convicted had been dropped in return for the witness' cooperation and testimony, but the United States Attorney's records indicated that the Assistant had agreed to drop two counts in return for a guilty plea to the third count, the Court of Appeals' judgment affirming petitioner's conviction is vacated and the case is remanded to that court so that if on the basis of Government documentation it is unable to decide whether the Assistant "failed to make any required disclosure," it can remand the case to the District Court for further proceedings.

Certiorari granted; — F. 2d —, vacated and remanded.

PER CURIAM.

Petitioner was convicted on one count of conspiracy to import cocaine in violation of 84 Stat. 1260, 21 U. S. C. § 841 (a)(1), and 84 Stat. 1285, 21 U. S. C. § 952 (a). At trial, the Government's chief witness against petitioner testified on direct examination by the Assistant United States Attorney that no promises had been made to her with respect to three counts of an indictment that had been returned against her involving the same events for which petitioner stands convicted. At the time this witness testified, she had pleaded guilty to one count of that indictment, a fact which she acknowledged. On cross-examination, she repeated her statement to the effect that no promises had been made to her. During summation, petitioner's counsel indicated that the two other counts against the witness had been dropped in return for her cooperation and testimony in petitioner's case.